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No. 94-1288

In The

Supreme Court of the United States

October Term, 1994

HIRAM WALKER AND SONS, INC.,

Petitioner,

vs.

KIRK LINE, R.B. KIRKONNELL & BRO. LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE; ELLER & COMPANY INC., INDIAN RIVER TRANSPORT, INC.; AND S.S. MORANT BAY, its engines, boilers, etc.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent's statement of the case in its opposing brief ranges from the innocuous to the insulting. Despite Respondent's reworking of the facts, the record is clear that the answers by all parties to the question of who had the obligation to transfer the liqueur is unimpeached. Only Petitioner had that obligation. Nor is there any dispute that Eller's testimony was that it was in the process of delivering the cargo to Hiram at the time of the loss. That having been said, Petitioner's argument with the Court below is how it dealt with the applicable law. From the inception of this case, Petitioner has consistently advanced the points it makes in this petition.

Petitioner cannot, however, leave unaddressed the innuendo by Respondent that it is by some subterfuge that Petitioner's insurer is not a direct party to this action. It is sufficient for this Court to be advised that both Hiram and Eller were insured as regards this loss, that Eller knew of Aetna's involvement even prior to the commencement of litigation, and that suing in the name of Hiram was proper both by virtue of the insurance contract and the law (83a). Eller knows that the caption of this lawsuit was never amended at its suggestion to include Aetna. There is no basis for Respondent's assertion that Hiram has no standing to bring this Petition. Nor is there any reason for Respondent's inapposite discussion of the consequences of declaring higher values. Under equitable rules of subrogation an insurer is just as entitled to the benefits of maritime law as is its insured, and, in paying the loss is similarly harmed as is the insured merchant.

1. The Court should grant the Petition to resolve the question of the effect of the Harter Act on a contractually extended limit of liability claimed by a terminal operator.

More is said in Respondent's brief by what is not addressed, than by what is, on the question stated above. Conspicuous by its absence is *any* discussion of ***Section 191 of the Harter Act. (46 U.S.C. App. Section 191).*** Nowhere does Eller comment on whether its obligations to properly deliver the cargo were lessened, weakened or avoided by the bill of lading's limitation of liability clause.

Eller argues forcefully that its role was essential to the overall carriage of the cargo because it performed the last act – that of delivery. Why then, does it not tell this Court where it was charged with that task? Where is the touchstone against which its actions can be tested?

It does not dispute the fact that neither the bill of lading, nor the parties, nor the ***Carriage of Goods by Sea Act*** charged it or its principal, Kirk, with the job of delivery. And yet, all concede that such an obligation is of the essence of carriage of goods by sea.

It suggests to this Court, without any citation of authority, believing that saying-makes-it-so, that the ***Harter Act*** has no application to this case. But it is the ***Harter Act*** alone which completes the carriage of goods by sea. For, it alone, obligates the carrier to properly deliver the cargo. And yet Eller, and the Court below, omitted any consideration of, or reference to ***Harter.***

Eller's position that ***COGSA*** applies to this case *ex proprio vigore* is wrong. Eller was not a carrier, and its activities all happened after discharge. ***COGSA***'s provisions applied only as another term of the bill of lading contract. ***Allied Chemical v. Companhia de Navagacao, 775 F.2d 476, 483 (2nd Cir. 1985).*** However, that did not alter the applicability, as a statute, of the ***Harter Act,*** after discharge. And yet Eller, and the Court below relegated ***Harter*** to the dustbin of history in a case where it alone defined Eller's rights and obligations.

Carried to its inevitable conclusion, Respondent's position that ***Harter*** plays no part in this scenario leaves it positing a truncated version of American maritime law, where, after discharge from the ship, anything goes regarding how cargo is handled or delivered. This is so because ***COGSA*** simply does not address that question. ***COGSA*** alone, according to Eller, defined its rights and obligations. But Eller forgets that ***COGSA*** itself, in ***Section 1311 (46 U.S.C. App. Section 1311)*** informs the maritime law that the ***Harter Act*** applies, not ***COGSA,*** " . . . to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

Only by addressing the intent of ***Harter,*** as regards its effect on Eller's right to limit its liability in the absence of a proper delivery, can this important area of maritime law be settled. That it is unsettled is amply demonstrated by the Respondent's own assertions in this case. Eller does not deny that it failed to make a proper delivery. It just goes on to assert that, having failed in that regard, it

is nevertheless entitled to be rewarded, because the bill of lading extended a $500 limit.

In short, the question is whether the ***Harter Act*** tempers the right to limit liability after discharge. ***Philip Morris v. American Shipping Co. Inc., 748 F.2d 563 (11th Cir. 1984)*** and ***Baker Oil Tools v. Delta, 562 F.2d 938 (5th Cir. 1977)*** squarely held, yes. The Eleventh Circuit below, in the case at bar, held, no.

2. The Court should grant the Petition to resolve this split in the Circuits.

Respondent's attempt to distinguish ***Philip Morris*** and ***Baker*** is disingenuous and misleading. It says that those decisions were based on the Courts' perceived delay of cargo movement. (Resp. p.17) That statement is wrong and has no basis in fact. In ***Philip Morris,*** the decision turned on the carrier's negligence in not protecting the cargo. In fact, the Court specifically held, "Moreover, the delay in the procurement of the cargo was not the cause of the damage." Id. at 567. In ***Baker,*** the carrier was held liable because it lost the cargo. Delay had nothing to do with the decision.

In both cases, full damages were assessed. In both cases ***COGSA*** applied as a contract term. In both cases the loss happened on the pier. In both cases, ***Harter*** governed.

3. The Court should grant the Petition to review the doctrine of "Deviation" as it affects the entire contract of carriage.

Whether the rationale of those cases is founded in deviation, or the prohibitions of ***Harter*** against lessening,

weakening, or avoiding obligations is not clear. The result, however is the same. The carrier is denied a limitation.

While the doctrine of deviation originally grew out of a geographical deviation of the ship from its announced voyage, it has been expanded to include on deck stowage where under deck is expected. ***St. Johns N.F. Shipping Corp. v. S.A. Companhia—Geral Commercial Do Rio de Janeiro, 263 U.S. 119 (1923).*** There is no reason why any deviation from the agreement which exposes cargo to risks greater than agreed to should not result in similar consequences.

Respondent's suggestion that heavy loads are lifted all the time is irrelevant because parties to those transactions expect that such activities are necessary to load or unload the goods. Here, however, the testimony was quite the opposite. Lifting the tank was not expected or bargained for. Everyone understood that the transfer was to be made by pumping. Had the pump or hose leaked and the goods were thus lost there might have been negligence but no deviation. But where, as in *St. Johns*, supra, the breach of the contract "exposed them to greater risk than had been agreed and thereby directly caused the loss," Eller "became liable as for a deviation."

"Deviation" is a consequence driven doctrine. A ship may alter its itinerary often with impunity. But if cargo is lost or damaged thereby, the ship loses its contractual benefits. A carrier may bet that putting cargo on deck instead of in a hold will cause no harm and may do so

often and if no harm befalls the cargo, there is no complaint, but if it loses the bet, it loses its limit. The progression to the case at bar is irresistable. Eller bet that taking an eighteen wheel tank truck airborne in violation of the contract would not result in loss. Many times it won. This time it lost. It alone, not the petitioner or its insurer should bear the loss. The cargo owners in *St. Johns* expected that the goods would rest under deck not on deck; Hiram expected that the goods would rest on wheels not on the blades of a forklift suspended in air.

Respondent argues that lifting the Kirk truck was not dangerous. But Eller's own vice-president testified that it was, using that very term. He said it was dangerous. That, he said, was why he would not have approved of it had he known it was happening. Obviously it was dangerous to leave the truck suspended in space. Obviously Hiram never expected that its goods, moving on a roll-on roll-off vessel would take to the air. That breached its agreement. A deviation resulted.

Distinguishing fact patterns as Eller does, does nothing to enlightened the law of admiralty. Neither does its failure to enlighten this Court as to why its failure to adhere to the contract and properly deliver the cargo after discharge from the ship should entitle it to the limit.

4. The Court should grant the Petition to clarify the intent of *Robert C. Herd & Company, Inc. v. Krawill Machinery Corp., 359 U.S. 297 (1959)*

Even where Respondent addresses the issue it fails to enlighten. The cases are legion where Himalaya clauses, purporting to extend limits to stevedores and others have

been found lacking. Hiram suggests that the clause involved in this case is such a one. A contract provision which lacks clarity is not thereafter imbued with propriety *ex post facto* by the actions of the parties. On its face clause 17 (Pet. p.17) is ambiguous. And it is at the time the contract is made that its efficacy must be judged. It could literally be read to limit the liability of *any* agent, servant or employee performing services, for *anyone,* in connection with the goods. But this Court intended in ***Herd*** to have ***COGSA*** limits run only to the benefit of the ocean carrier's agents who were performing only that carrier's work.

The mischief which the clause in the case at bar has already caused is amply demonstrated by the history of this case. Eller complains that Hiram's suggestion that the clause could be said to apply to Indian River is far-fetched. Yet that is precisely what happened. Early on, in 1986, relying on that clause, Indian River, the trucker hired by Hiram to transfer the liqueur from the Kirk truck to its truck for delivery to New Jersey, in fact did move for summary judgment arguing a right to the $500 limit pursuant to the bill of lading. (Pet. pp.13; 92a). Its motion was denied on other grounds. It thereafter chose to settle the case.

The ultimate question remains unanswered. On its face, is the clause a valid fulfillment of this court's expectations?

CONCLUSION

The Petition for Writ of Certiorari should be granted. This Court, or the Court below, at this Court's direction, should reverse and grant judgment for the full loss.

Respectfully submitted,

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